

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

NICOLE NEWMAN,

Plaintiff,

vs.

AMERICREDIT FINANCIAL
SERVICES, INC.,

Defendant.

Case No. 11cv3041 DMS (BLM)

**ORDER GRANTING
AMENDED UNOPPOSED
MOTION FOR
PRELIMINARY APPROVAL
OF CLASS ACTION
SETTLEMENT**

Pending before the Court in this action for violation of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (“TCPA”), is Plaintiff’s amended motion for class certification and preliminary approval of class action settlement.¹ Defendant filed a notice of non-opposition. Plaintiff’s prior motions seeking the same relief were denied on April 15, 2013 and February 3, 2014, respectively. Subsequently, the parties conducted additional discovery and amended the settlement agreement. The motion came on for hearing on November 24, 2014. Abbas Kazerounian and Alexander Burke appeared for Plaintiff; Chad Fuller, Naomi Spector and Marci Mancuso appeared for

¹ This action was consolidated with *Mack v. General Motors Financial Corp., Inc.*, 12cv 3038-DMS (BLM) for purposes of class action settlement. After Ms. Mack passed away on May 17, 2013, her daughter, Julie Schultz, for herself and on behalf of the estate, settled Ms. Mack’s individual claims. Accordingly, on November 14, 2013, the *Mack* action was dismissed with prejudice as to Plaintiff’s individual claims. The putative class members’ claims were dismissed without prejudice.

1 Defendant. Having read and considered Plaintiff's motion papers and counsel's
2 presentations at the hearing, the amended motion is granted.

3 Defendant administers automobile loan accounts. Plaintiff and the proposed
4 nation-wide class are individuals who allegedly received calls to their mobile phones
5 from Defendant using autodialing equipment or a prerecorded voice message in
6 violation of the TCPA. In her complaint, Plaintiff alleges claims for negligent, knowing
7 and willful TCPA violations. Plaintiff requests \$500 in statutory damages for each
8 negligent violation, and treble statutory damages of up to \$1,500 for each knowing or
9 willful violation, as well as injunctive relief against future violations. The Court has
10 subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

11 The action settled without any substantive motion practice after two conferences
12 with Magistrate Judge Barbara Lynn Major and a two-day mediation with Magistrate
13 Judge Leo S. Papas (ret.). The parties conducted formal and informal discovery in the
14 present case. Plaintiff also benefitted from discovery in *Mack v. General Motors*
15 *Financial Corp., Inc.*, 12cv3038-DMS (BLM), a related action which has since been
16 dismissed.

17 In general, the amended settlement agreement provides for certification of a class
18 action for settlement purposes and Defendant's payment of up to \$8.5 million² in
19 exchange for a release from class members without Defendant's admission of fault.
20 (Kazerounian Decl." Ex. 1 (Settlement Agreement dated Oct. 25, 2013) ("Settlement").)

21 Plaintiff proposes to certify a class defined as:

22 all persons who were called on a cellular telephone by Defendant ... or a
23 third party dialing company on behalf of Defendant, using an automated
24 telephone dialing system or by prerecorded voice message between
25 December 30, 2007 through one week prior to the date of the hearing on
26 the Second Amended Motion for Preliminary Approval of Class Action
27 Settlement.

28 ² Defendant is obligated to pay a minimum of \$6.5 million. If \$6.5 million
is insufficient for class member awards of at least thirty dollars (\$30) each, Defendant
is obligated to pay an additional sum necessary to increase the awards to thirty dollars
(\$30) each. However, Defendant is not obligated to pay more than a total of \$8.5
million. (Settlement ¶ 1.22.)

1 (*Id.* Ex 1 (Addendum to the Settlement Agreement (“Addendum”) ¶1.04.) Accordingly,
2 the proposed class includes individuals who had an auto loan account with Defendant
3 and those who did not, so long as Defendant called them on their mobile phone without
4 consent. For example, Plaintiff Nicole Newman’s brother had an auto loan account, but
5 the calls were made to Plaintiff’s mobile phone, even though she did not have an
6 account.

7 According to the settlement, Defendant’s payment is allocated as follows: (1)
8 notice and settlement administration costs, estimated at \$1,552,491 (Passarella Decl. at
9 3); (2) attorneys’ fees and costs of class counsel of up to \$2,065,000, subject to an
10 appropriate motion, including proof of reasonableness, *see* Fed. R. Civ. Proc. 23(h); (3)
11 class representative’s incentive award of up to \$1,500, subject to an appropriate motion,
12 *see Radcliffe v. Experian Info. Solutions, Inc.*, 715 F.3d 1157 (9th Cir. 2013); and (4)
13 a pro rata distribution, based on a tiered recovery system, to class members who submit
14 valid claims. (Addendum ¶ 1.22.) Class member recovery is allocated per mobile
15 phone number called, resulting in one recovery per number, even if the same class
16 member was called on more than one mobile number or if more than one individual was
17 associated with Defendant’s account. (Settlement ¶1.06.) Class members may elect a
18 minimum recovery estimated at \$30 per mobile number, without the need to present
19 evidence of the number of calls received from Defendant. (Addendum ¶ 1.22.) Class
20 members desiring a higher recovery must submit proof of the number of calls. (*Id.*)
21 The estimated tiered recovery is \$60 for two to five calls per mobile number; \$90 for
22 six to ten calls; \$120 for eleven to fifteen calls; and \$150 for more than fifteen calls.
23 (*Id.*) If the total amount of claims exceeds \$8.5 million, individual awards will be
24 reduced *pro rata*.

25 As of November 14, 2014, Defendant identified 3,091,108 unique mobile phone
26 numbers as having been sent to the automatic dialer. (Kinley Decl. filed Nov. 20, 2014,
27 at 2.) It is Defendant’s practice to call numbers that are sent to the dialer, whether or
28 not the numbers belong to individuals who have an auto loan account with Defendant.

1 (*Id.* at 2-3.) Assuming that (1) each mobile phone number is associated with a different
2 class member, and each class member makes a valid claim for the minimum award, (2)
3 the notice and settlement administration costs are as estimated, and (4) the class counsel
4 and representative are awarded their entire requests, the award will approximate \$1.58
5 per class member, even if Defendant pays the maximum sum of \$8.5 million.

6 Before approving a class action settlement agreement, the Court must make a
7 finding that a class may be certified. *See, e.g., Molski v. Gleich*, 318 F.3d 937, 943,
8 946-50 (9th Cir. 2003), *rev'd on other grounds by Dukes v. Wal-Mart Stores, Inc.*, 603
9 F.3d 571 (9th Cir. 2010). "The class action is 'an exception to the usual rule that
10 litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, ___U.S.___, 131 S.Ct. 2541, 2550 (2011). "A party
11 seeking class certification must satisfy the requirements of Federal Rule of Civil
12 Procedure 23(a) and the requirements of at least one of the categories under Rule
13 23(b)." *Wang v. Chinese Daily News, Inc.*, 709 F.3d 829, 832 (9th Cir. 2013); *United*
14 *Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indus. & Serv. Workers Int'l*
15 *Union v. ConocoPhillips Co.*, 593 F.3d 802, 806-07 (9th Cir. 2010) ("*United Steel*")
16 (burden is on the moving party). Plaintiff seeks certification under Rule 23(a) and
17 (b)(3).
18

19 Although the fact of settlement is relevant to the class certification analysis,
20 certification must nonetheless meet Rule 23(a) and (b)(3) requirements, which demand
21 heightened attention in the settlement context:

22 Confronted with a request for settlement-only class certification, a district
23 court need not inquire whether the case, if tried, would present intractable
24 management problems, see Fed. Rule Civ. Proc. 23(b)(3)(D), for the
25 proposal is that there be no trial. But other specifications of the
26 Rule—those designed to protect absentees by blocking unwarranted or
27 overbroad class definitions—demand undiluted, even heightened, attention
in the settlement context. Such attention is of vital importance, for a court
asked to certify a settlement class will lack the opportunity, present when
a case is litigated, to adjust the class, informed by the proceedings as they
unfold.

28 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997), *see also id.* at 620-27.

1 This action meets the class certification requirements. The proposed class
2 consists of individuals associated with 3,091,108 mobile phone numbers. The class
3 therefore meets the numerosity requirement. The action is based on the allegations that
4 Defendant used an autodialer to call each of the mobile numbers. Based on the
5 evidence presented in support of the motion, Defendant had a practice of calling every
6 number sent to the automatic dialer. The issues whether Defendant's automatic dialer
7 meets the TCPA definition and whether the calls were knowing or willful TCPA
8 violations are common to all class members. Finally, only individuals who did not
9 consent to the calls are members of the class. Accordingly, the legal and factual issues
10 presented are sufficiently uniform to meet the commonality and predominance
11 requirements. Based on the allegations in the complaint, Plaintiff's claims are typical
12 under the amended class definition, as liability is not driven by the question whether
13 class members had an auto loan account with Defendant, but solely by whether
14 Defendant called them without consent to a mobile phone number using an automatic
15 dialer or a prerecorded voice. Plaintiff and his counsel have demonstrated they can
16 adequately represent the absent class members. Finally, the Court finds that
17 maintenance of this action as a class action is superior to individual litigation. This
18 action therefore meets the class certification requirements.

19 Rule 23(e) requires court approval of class action settlements. A class action
20 settlement may be approved only based on a finding that the settlement is "fair,
21 reasonable, and adequate." Fed. R. Civ. Proc. 23(e)(2). The settlement proponents
22 ultimately bear the burden to show that the proposed settlement meets this standard.
23 *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003); *see also Officers for Justice*
24 *v. Civil Svc. Comm'n. of the City and County of San Francisco*, 688 F.2d 615, 625 (9th
25 Cir. 1982). The factors relevant to the inquiry include the strength of the plaintiffs'
26 case; the risk, expense, complexity, and likely duration of further litigation; the risk of
27 maintaining class action status throughout the trial; the amount offered in settlement;
28 the extent of discovery completed; the stage of the proceedings; absence of collusion

1 between the negotiating parties, and the experience and views of counsel. *Staton*, 327
2 F.3d at 959-60.

3 Prior to filing the pending motion, the parties engaged in extensive informal and
4 formal discovery. The settlement in its present form was reached after a two-day
5 mediation with Magistrate Judge Leo S. Papas (ret.), and arm's-length negotiations
6 assisted by Magistrate Judge Barbara Lynn Major, including extensive negotiations
7 after Plaintiff's motion for preliminary approval was twice denied by this Court. All
8 counsel recommend that the Court approve the settlement. Based on the foregoing and
9 the assessment of the strengths and weaknesses of Plaintiff's case as discussed in the
10 pending motion, the probable course of further litigation in the absence of settlement,
11 the risk of maintaining class action status through trial, and the class member benefits
12 provided by the settlement, the Court makes a preliminary finding that the settlement
13 is fair, reasonable and adequate.

14 With respect to the class notice, Rule 23(c)(2)(B) requires "the best notice that
15 is practicable under the circumstances, including individual notice to all members who
16 can be identified through reasonable effort." Rule 23(e)(1) requires reasonable notice
17 to all class members who would be bound by the proposed settlement. The notice must
18 explain in easily understood language the nature of the action, definition of the class,
19 class claims, issues and defenses, ability to appear through individual counsel,
20 procedure to request exclusion, and the binding nature of a class judgment. Fed. R. Civ.
21 P. 23(c)(2)(B).

22 The notice procedure under the settlement as amended, and as elaborated in the
23 pending motion, includes four components: (1) a full notice in a question and answer
24 format posted on the settlement website along with the claim and opt-out forms and
25 other important documents; (2) summary postcard notice with a claim form to putative
26 class members whose addresses are available; (3) summary notice by publication in
27 USA Today; and (4) an internet advertising campaign targeting 150 million internet
28 impressions with a link to the settlement website. (*See* Passarella Decl. filed Oct. 14,

2014; Kazerouni Decl. at 10-12.) The proposed method meets the requirements of Rule 23(c)(2)(B) and (e)(1).

The content of the proposed notices, attached as Exhibits B, C & E to Plaintiff's Exhibit 1, is approved pursuant to Rule 23(c)(2)(B) and (e)(1), but with the following changes:³

a. Long Form Notice (Ex. B):

Paragraph 3, "What if I did not get a postcard with notice of the Settlement?": At the end of line 1, after "it is likely," insert the following clause: "your name may not have been associated with an AmeriCredit account, ...".

Paragraph 5(2), "What are the terms of the Settlement?: The first sentence shall read: "Each Class Member who submits a Valid Claim Form may elect to receive up to \$30 per cell phone number dialed during the Class Period."

Paragraph 5(3), "What are the terms of the Settlement?: The phrase "up to" shall be added to the amounts listed in subparagraphs I. through iv.

Paragraph 7(2), "How can I make a claim for monetary payment?: Include the following sentence at line 1: "Although using the form is not required, you may download a claim form from the Settlement Administrator's website, www.NewmanAmeriCreditSettlement.com. Whether or not you use the form, your claim must include your: ...".

Paragraph 11, "How do I get out of the Settlement?" and Paragraph 15, "How do I tell the Court that I do not like the Settlement": The correct reference to the case number is 11cv3041-DMS-BLM.

The Long Form notice shall include the dates when the claim administrator website and/or telephone number ceases to be active, and provide an alternative convenient means for obtaining information about the case and specific claim processing status after that date.

³ Text additions are marked by underscoring and deletions are marked by strikeouts. Ellipses indicate that the omitted part of the sentence or paragraph is unchanged.

1 b. Postcard Notice (Ex. C):

2 The second to the last sentence of the second to the last paragraph on page
3 2 shall read as follows: “More information, including a complete notice with additional
4 important information, the claim form and opt-out form, and copies of the settlement
5 agreement and important case filings, is available at
6 www.NewmanAmeriCreditSettlement.com.”

7 The Postcard Notice shall include the dates when the claim administrator
8 website and/or telephone number ceases to be active, and provide an alternative
9 convenient means for obtaining information about case and specific claim processing
10 status after that date.

11 c. Publication Notice (Ex. E):

12 The fifth and sixth sentences of the second paragraph shall read in
13 pertinent part as follows: “~~Claim amounts~~ Actual settlement distribution to each Class
14 Member will be based on: (1) the total number of claims received; and (2) the amount
15 of Settlement Benefits ~~needed~~ available to pay the claims To inquire about the
16 Settlement or to access a complete notice with additional important information, the
17 claim form and opt-out form, and copies of the settlement agreement and important case
18 filings, call” The last sentence of the second to the last paragraph shall be deleted.

19
20 The Publication Notice shall also include the dates when the claim
21 administrator website and/or telephone number ceases to be active, and provide an
22 alternative convenient means for obtaining information about case and specific claim
23 processing status after that date.

24 Finally, the Court approves the claim processing and class action administration
25 procedure as proposed in the amended settlement and elaborated in the pending motion.
26 The parties have cured the issues identified in the February 3, 2014 order denying
27 preliminary approval of class action settlement.

28 Based on the foregoing, the Court finds and orders as follows:

1 1. This action meets the class certification requirements of Federal Rule of
2 Civil Procedure 23(a) and (b)(3). Pursuant to Rule 23(c), the Court conditionally
3 certifies, for settlement purposes only, the following class:

4 All persons who were called on a cellular telephone by Defendant, as
5 defined in the Settlement Agreement, or a third party dialing company on
6 behalf of Defendant, using an automatic telephone dialing system or by
prerecorded voice message between December 30, 2007 through
November 14, 2014.

7 2. Plaintiff Nicole Newman is appointed as class representative. Pursuant to
8 Rule 23(g), her counsel Abbas Kazerounian and Alexander H. Burke are appointed as
9 class counsel ("Class Counsel").

10 3. The settlement as amended is approved on a preliminary basis, and the
11 Court preliminarily approves the terms of the settlement as fair, reasonable and
12 adequate under Rule 23(e).

13 4. On conditions specified in the body of this order, the Court finds that the
14 method of distribution, form and content the notice of class certification and proposed
15 settlement, attached as Exhibits B, C & E to Plaintiff's Exhibit 1 and as stated in the
16 settlement with its addendum and described in the pending motion, satisfy due process
17 requirements and the requirements of Rule 23(c)(2) and (e)(1), and collectively
18 constitute the best notice practicable under the circumstances.

19 5. Kurtzman Carson Consultants LLC ("KCC") is appointed as settlement
20 administrator. KCC shall comply with its duties as set forth in the settlement with its
21 addendum, and as represented in the pending motion. The settlement website and
22 toll-free number shall be maintained by KCC through December 31, 2015.

23 6. No later than **December 5, 2014**, Defendant shall deliver a class member
24 list to KCC as provided in the Addendum ¶ 2.02.

25 7. No later than **December 26, 2014**, KCC shall (1) mail the postcard notice
26 by First Class United States Mail; (2) establish and maintain a settlement website,
27 www.NewmanAmeriCreditSettlement.com with capacity to process claims and requests
28 for exclusion, and provide access to documents such as the postcard notice, the long

1 form notice (in both English and Spanish), claim and exclusion request forms, the
2 settlement agreement and addendum with exhibits, including the claim and request for
3 exclusion forms, any motions for attorneys' fees, costs and/or class representative
4 incentive awards, and orders relating to preliminary and final approval of class action
5 settlement, or any subsequent orders relevant to the status of the settlement; (3) open
6 a toll-free phone line to class members; (4) commence an online advertising campaign
7 notifying class members of the settlement, which will include 150 million impressions
8 through Xaxis's Premium Network (XPN); and (5) publish the notice in USA Today.

9 8. No later than **March 26, 2015**, (1) class members shall submit claims on
10 the website or postmark them if submitted by mail, and (2) Plaintiff shall file a motion
11 for attorneys' fees, costs and class representative's incentive award, if any.

12 9. No later than **April 6, 2015**, (1) putative class members shall submit any
13 requests for exclusion on the website or postmark them if submitted by mail, and (2)
14 Defendant shall give notice of objection to any claim.

15 10. No later than **April 24, 2015**, class members shall submit objections or file
16 motions to intervene, if any.

17 11. No later than **May 8, 2015**, Plaintiff shall file a motion for final approval
18 of class action settlement, and any supplemental briefing in support of motion for
19 attorneys' fees, costs and incentive award. In addition to the required and customary
20 filings, the motion papers shall include (1) an affidavit regarding any responses by the
21 attorneys general to the notice served pursuant to 28 U.S.C. § 1715; and (2) KCC's
22 affidavit regarding compliance with its duties under the settlement, its addendum, and
23 this Order, a copy of the notices distributed to the class, a report on the number of class
24 members to whom notice was mailed, the number of undelivered notices, efforts to
25 locate correct addresses for undelivered notices after the first mailing, number of notices
26 sent to the updated addresses in a second mailing, the number of such notices returned
27 undelivered, the number of visits to the settlement website as a result of the online
28 advertising campaign, the number of class members seeking exclusion (including

1 untimely requests), the number of class members to whom payment will be made, the
2 average class member payment, and the range between the highest and lowest
3 payments.

4 12. A hearing is set on this Court's calendar for **Friday, May 22, 2015, at 1:30**
5 **p.m.** in Courtroom 13A of the United States District Court for the Southern District of
6 California, located at 333 West Broadway, San Diego, California 92101, to determine
7 all necessary matters concerning the settlement, including: whether the proposed
8 settlement is fair, adequate, and reasonable; whether the settlement should be finally
9 approved by the Court; whether the plan of allocation contained in the settlement should
10 be approved as fair, adequate, and reasonable; whether to grant any motions for
11 attorneys' fees, costs, and the class representative incentive award; and whether a
12 judgment should be entered (the "Final Approval Hearing").

13 13. The Final Approval Hearing may be postponed, adjourned, or continued
14 by order of the Court without further notice to the class. After the Final Approval
15 Hearing, the Court may enter an order and final judgment that will adjudicate the rights
16 of the class members with respect to the claims being settled.

17 14. Any class member may choose to opt out of and be excluded from the class
18 as provided in the notice by following the instructions set forth in the notice. Any class
19 member who chooses to opt out of and be excluded from the class will not be entitled
20 to any recovery under the settlement and will not be bound by the settlement or have
21 any right to object to the settlement or appeal the judgment. Any request to opt out
22 must be in writing signed by the class member seeking to opt out. Individuals in the
23 class who have not requested exclusion shall be bound by all determinations of the
24 Court, the settlement and any judgment that may be entered thereon.

25 15. Any class member may appear at the Final Approval Hearing and object
26 to the settlement or any motion for attorneys' fees, costs or incentive award
27 ("Objectors"). Objectors may present evidence and file briefs relevant to the issues to
28 be heard and determined by the Court. No later than April 24, 2015, Objectors shall

1 serve their briefs, if any, by hand or by first class mail upon Class Counsel and
2 Defendant, and file them with the Clerk of this Court.

3 16. As of the date this Order is signed, all dates and deadlines associated with
4 this action shall be stayed, other than those related to the administration of the
5 settlement.

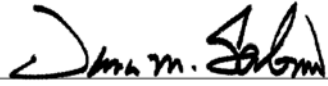
6 17. If the settlement does not become effective in accordance with its terms,
7 or the settlement is not finally approved, or is terminated, canceled or fails to become
8 effective for any reasons, this Order shall be vacated upon an appropriate motion filed
9 no later than seven calendar days after the triggering event.

10 18. Nothing contained in this Order is, or may be construed as, any admission
11 or concession by or against either side on any point of fact or law.

12 19. Pending final determination of whether the settlement should be approved,
13 Plaintiff, all persons in the class, and persons purporting to act on their behalf, are
14 enjoined from commencing or prosecuting (either directly, representatively, or in any
15 other capacity) against any of the Released Persons any action, arbitration, or
16 proceeding in any court, arbitration forum or tribunal asserting any of the released
17 claims.

18 **IT IS SO ORDERED.**

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20 DATED: November 26, 2014

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22 HON. DANA M. SABRAW
23 United States District Judge
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